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No.

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI,
Petitioner,

vs.

WILLIAM BROWN,
Respondent.

STATE OF MISSOURI,
Petitioner,

vs.

DONNIE L. COLLINS,
Respondent.

STATE OF MISSOURI,
Petitioner,

vs.

HAROLD HAWKINS,
Respondent.

STATE OF MISSOURI,
Petitioner,

vs.

EDDIE L. GREER,
Respondent.

STATE OF MISSOURI,
Petitioner,

vs.

JACKIE MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri courts are bound by *Brintley v. Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours v. State,* 603 S.W.2d 592 (Mo. banc 1980), where that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley v. Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.529, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours v. State,* 603 S.W.2d 592 (Mo. banc 1980), conflicts with this Court's decision rendered in *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)?

PARTIES

In the Missouri Court of Appeals, Western District, the parties were as follows:

State of Missouri, respondent, and William Brown, appellant, in cause No. WD 31,499;

State of Missouri, respondent, and Donnie L. Collins, appellant, in cause No. WD 30,966;

State of Missouri, respondent, and Eddie L. Greer, appellant, in cause No. WD 31,117;

State of Missouri, respondent, and Harold Hawkins, appellant, in cause No. WD 31,334;

State of Missouri, respondent, and Jackie Martin, appellant, in cause No. WD 31,116.

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OPINIONS BELOW

The opinions in the five cases for which the writ of certiorari is being sought are printed in Appendix A. Two of them have been published; the other three have not. In alphabetical order the cases are as follows:

William Brown v. State of Missouri, No. WD 31,499, opinion filed October 1, 1980, and now reported as *Brown v. State,* 607 S.W.2d 801 (Mo.App., W.D. 1980);

State of Missouri v. Donnie L. Collins, No. WD 30,966, opinion filed October 1, 1980, and now reported as *State v. Collins,* 607 S.W.2d 781 (Mo.App., W.D. 1980);

State of Missouri v. Eddie L. Greer, No. WD 31,117, opinion filed November 3, 1980, and presently unreported;

State of Missouri v. Harold Hawkins, No. WD 31,334, opinion filed November 3, 1980, and now reported as *State v. Hawkins,* 608 S.W.2d 496 (Mo.App., W.D. 1980);

State of Missouri v. Jackie Martin, No. WD 31,116, opinion filed October 1, 1980, and presently unreported.

JURISDICTIONAL STATEMENT

In *William Brown v. State of Missouri,* No. WD 31,499, the opinion of the Missouri Court of Appeals, Western District, was filed on October 1, 1980. The opinion affirmed Brown's conviction for robbery in the first degree [§ 560.120, RSMo 1969; § 560.135, RSMo Supp. 1975], and reinstated the ten-year sentence he had received for that offense pursuant to his plea of guilty, a sentence that was erroneously reduced to eight years in Brown's post-conviction proceeding under Missouri Supreme Court Rule 27.26. However, the Court of Appeals vacated Brown's conviction and consecutive six-year sentence (erroneously reduced in the Rule 27.26 proceeding to four years) for armed criminal action [§ 559.225, RSMo Supp. 1976]. On November 3, 1980, the State's timely motion for rehearing or transfer to the Missouri Supreme Court was overruled by the Court of Appeals. Thereafter, on December 15, 1980, the Supreme Court of Missouri overruled the State's

application to transfer to that court. The order denying the application is reprinted in Appendix A immediately following the opinion in this cause.

In *State of Missouri v. Donnie L. Collins,* No. WD 30,966, the opinion of the Missouri Court of Appeals, Western District, was filed on October 1, 1980. The court affirmed Collins' conviction and ten-year sentence for robbery in the first degree, but reversed Collins' conviction and concurrent ten-year sentence for armed criminal action. The State's timely motion for rehearing or transfer to the Missouri Supreme Court was denied by the Court of Appeals on November 6, 1980. Thereafter, the State's timely application to transfer to the Missouri Supreme Court was denied by that court on December 15, 1980. The order denying the application is reprinted in Appendix A immediately following the opinion in this cause.

In *State of Missouri v. Eddie L. Greer,* No. WD 31,117, the opinion of the Missouri Court of Appeals, Western District, was filed on November 3, 1980. The opinion affirmed Greer's two convictions and consecutive ten-year sentences for kidnapping in violation of § 559.240, RSMo 1969, his two convictions and consecutive 100-year sentences for forcible rape, in violation of § 559.260, RSMo Supp. 1975, and his two convictions and consecutive 100-year sentences for sodomy, in violation of § 563.230, RSMo 1969, but vacated Greer's two convictions and consecutive 100-year sentences for armed criminal action. The State's timely motion for rehearing or transfer to the Missouri Supreme Court was overruled by the Court of Appeals on December 2, 1980. Thereafter, the State's timely application to transfer to the Missouri Supreme Court was denied by that court on January 13, 1981. The order denying the application is reprinted in Appendix A immediately following the opinion in this cause.

In *State of Missouri v. Harold Hawkins,* No. WD 31,334, the opinion of the Missouri Court of Appeals, Western District, was filed on November 3, 1980. The Court affirmed Hawkins' conviction and ten-year sentence for robbery in the first degree, but vacated his conviction and three-year consecutive sentence for armed criminal action. The State's timely motion for rehearing or transfer to the Missouri Supreme Court was overruled by the Court of Appeals on December 2, 1980. Thereafter, the State's timely application to transfer to the Missouri Supreme Court was denied by that court on January 13, 1981. The order denying the application is reprinted in Appendix A immediately following the opinion in this cause.

In *State of Missouri v. Jackie Martin,* No. WD 31,116, the opinion of the Missouri Court of Appeals, Western District, was filed on October 1, 1980. The Court of Appeals affirmed Martin's conviction and seven-year sentence for robbery in the first degree, but vacated his conviction and consecutive five-year sentence for armed criminal action. The State's timely motion for rehearing or transfer to the Missouri Supreme Court was overruled by the Court of Appeals on November 3, 1980. Thereafter, the State's timely application to transfer to the Missouri Supreme Court was denied by that court on December 15, 1980. The order denying the application is reprinted in Appendix A immediately following the opinion in this cause.

The present petition has been filed within sixty days after the entry of final judgment in all of these cases, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED

Sections 560.120, RSMo 1969; 560.135, RSMo Supp. 1975; 559.240, RSMo 1969; and 559.225, RSMo Supp. 1976, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

This joint petition is brought as a result of the continuing controversy over the application of federal constitutional double jeopardy principles to the prosecution of criminal defendants in Missouri under its armed criminal action statute, § 559.225, RSMo Supp. 1976, and in the same trial, for the felony underlying the armed criminal action charge. In each of the five cases joined in this petition, the Missouri Court of Appeals, Western District, issued an opinion relying on the authority of *Sours v. State*, 593

S.W.2d 208 (Mo. banc 1980), *vacated and remanded,* 445 U.S. ..... (1980), *affirmed after remand,* 603 S.W.2d 592 (Mo. banc 1980), *cert. denied,* ..... U.S. ....., No. 80-571 (Jan. 26, 1981).

The facts in each of these five cases, for purposes of the double jeopardy clause, are substantially the same, inasmuch as each of the respondents was prosecuted under the armed criminal action statute, § 559.225, RSMo Supp. 1976, and also was prosecuted, at the same trial, for the underlying felony. In the cases of respondents Brown, Collins, Hawkins and Martin, the underlying felony was robbery in the first degree by means of a dangerous and deadly weapon, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975. In the case of respondent Greer, the underlying felonies used to support the armed criminal action charges were kidnapping, § 559.240, RSMo 1969.

The issues in this joint petition are identical to those involved in the petitions in *State of Missouri v. Wallace D. Counselman, Jr.,* No. 80-754, *State of Missouri v. Donald Greer,* No. 80-997, and *State of Missouri v. Randy Sinclair,* No. 80-1166. Moreover, it would appear that the issues presented by all of these aforementioned petitions, and by this present petition, are identical to the issues raised in the petitions for writs of certiorari now pending in *Hunter v. Delaware,* No. 80-283, and *Evans v. Delaware,* No. 80-749, as well as the direct appeal now pending before this Court in *Whack v. Maryland,* No. 80-5492.

REASONS FOR GRANTING THE WRIT

The petitioner submits that writs of certiorari should issue in each of the cases contained in this joint petition because they are all based entirely on the authority of the Missouri Supreme Court's holdings in *Sours v. State,* 593 S.W.2d 208 (Mo. banc 1980), *affirmed after remand,* 603 S.W.2d 592 (Mo. banc 1980), which conflicts with recent decisions of this Court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours v. State,* 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours I*), and remanded the case to the Missouri Supreme Court for further consideration in light of *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *Missouri v. Sours,* 445 U.S. ....., 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). The Missouri Supreme Court responded to this Court's directive on August 18, 1980, by rendering an opinion in *Sours v. State,* 603 S.W.2d 592 (Mo. banc 1980), in which the Missouri Supreme Court, after expressly ruling that the Missouri legislature clearly intended that punishment be imposed for *both* armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours I.* See *Sours v. State, supra,* 603 S.W.2d at 603-604.

Although the Missouri Supreme Court was presented with the argument that the combined authority of both *Whalen v. United States, supra,* and *Brintley v. Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), demonstrated this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even

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1. The Missouri Supreme Court's most recent holding in *Sours* was identical to its original holding made prior to this Court's granting of the State's petition for a writ of certiorari.

where the proof required to establish a violation of the first offense is necessarily required to prove the second, if the legislature so intends, it nevertheless opined as follows:

> "The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal Constitution. The Court expressly declined to rule on this issue in *Simpson v. United States,* 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978). *Cf. Whalen v. United States,* ..... U.S. ....., 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Each time a similar double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. *Whalen v. United States,* ..... U.S. ....., 100 S.Ct. 1432, 1435 (1980); *Simpson v. United States,* 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Iannelli v. United States,* 420 U.S. 770, 785-86 nn. 17-18, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). *See Jeffers v. United States,* 432 U.S. 137, 155, 97 S.Ct. 2207, 53 L.Ed. 2d 168 (1977). No United States Supreme Court opinion has considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute."

Sours v. State, supra, 603 S.W.2d at 593.

In discussing *Whalen v. United States, supra,* the Missouri Supreme Court stated:

> ". . . The Court expressly reserved the question whether, had Congress clearly intended to impose multiple punishments for the same offense, the imposi-

> tion of such punishment would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. . . Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented." [footnote omitted.]

Sours v. State, supra, 603 S.W.2d at 594.

Before reasserting its position taken in *Sours I,* the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its underlying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the statute (See Appendix B), that punishment be imposed for both crimes. *Sours v. State, supra,* 603 S.W.2d at 597-603. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent:

> "The unique wording of armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." [footnote omitted.]

Sours v. State, supra, 603 S.W.2d at 603.

The Missouri Supreme Court then proceeded to readopt the original opinion rendered in *Sours I,* but not without, again, the specter of the United States Supreme Court reappearing:

> "If the vacation of our prior judgment and the remand of the case for reconsideration in light of ***Whalen,***

> was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant to the state legislature the power to define the meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it."

Sours v. State, supra, 603 S.W.2d at 606.[2]

The petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to

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2. Although this Court did not take advantage of its opportunity to "make such a ruling" when it recently denied the State's second petition for writ of certiorari in the case, *Missouri v. Sours,* ..... U.S. ....., No. 80-571 (Jan. 26, 1981), this presumably was because the case was moot, since this Court had been informed that the respondent had fully served both his sentences for armed criminal action, and for the underlying felony.

elucidate the law of double jeopardy herein raised. In *Brintley v. Michigan, supra,* the appellant sought to present the following question to this Court:

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), prescribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b) where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in armed robbery case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies."

26 Crim.L.Rptr. 4113. (§ 750.227(b), M.C.L.A., appears in Appendix D).

The petitioner submits that this Court's summary dismissal in *Brintley v. Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours I* and *Sours II.* Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel v. Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks v. Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they do prevent lower courts from coming to contrary conclusions on identical issues. *Mandel v. Bradley supra.* It is clear that the

Missouri Supreme Court in *Sours II* reached a conclusion contrary to that reached by this Court in *Brintley v. Michigan, supra.* The Michigan statute, which appears in Appendix C, is remarkably similar to Missouri's armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of the respondent's conviction for armed criminal action in *Sours I* and *Sours II.*

This Court has manifested its disapproval of state court expansion of federal constitutional rights as evidenced by this Court's opinion rendered in *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> ". . . [A] state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citations omitted]. But, of course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." [footnote omitted; court's emphasis.]

Id., 420 U.S. at 719. See also *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

The petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen v. United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen,* that:

> "In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals be-

> lieved, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide."

Whalen v. United States, supra, 100 S.Ct. at 1436. [emphasis added.] It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> "The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty."

Whalen v. United States, supra, 100 S.Ct. at 1436-1437. [citations and footnote omitted; emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* stated:

> "We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of constructing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses

> are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress."

Whalen v. United States, 100 S.Ct. at 1438-1439. [emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent opinion in *Illinois v. Vitale,* ..... U.S. ....., 100 S.Ct. 2260, 2265, 65 L.Ed.2d 228 (1980), where the test is characterized as follows:

> "In *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), which in turn relied on *Gavieres v. United States,* 220 U.S. 338, 342-343, 31 S.Ct. 421, 422, 55 L.Ed 489 (1911), we held that
>
> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' *Brown v. Ohio,* 432 U.S., at 166, 97 S.Ct. at 2225." [emphasis added.]

Illinois v. Vitale, supra, 100 S.Ct. at 2265.

In any event, as previously emphasized, contrary to what the Missouri Supreme Court concluded in *Sours I* and *Sours II,* the double jeopardy clause of the Fifth Amendment does not prohibit multiple punishments even

for crimes that are considered to be the "same offense" under the *Blockburger* rule of statutory construction, if "specifically authorized" by Congress or a state legislature. *Whalen v. United States, supra,* 100 S.Ct. at 1439. This holding was recently reaffirmed in *United States v. Di Francesco,* ..... U.S. ....., No. 79-567 (Dec. 9, 1980), 28 Crim.L.Rptr. 3017, 3024, where this Court observed:

> "As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment. See *Whalen v. United States,* 446 U.S. ....., ... (1980) (slip op., pp. 3-4); *id.,* at .... (concurring opinion) (slip op., p. 2). The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange.*"

In other words, "the double jeopardy clause operates as a *presumption* against finding that domestic law intends multiple offenses and multiple punishment, a presumption that can be overcome only by 'clear and unmistakable' evidence that the domestic law intends offenses and sentences be cumulated." Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 Mich. L. Rev. 1001, 1026 (1980). In the case of Missouri's armed criminal action statute, of course, even the Missouri Supreme Court readily conceded that the Missouri State Legislature "clearly and unmistakably" intended that a criminal defendant be convicted and punished for both armed criminal action *and* the underlying felony. The petitioner submits that a definitive de-

cision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appear to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have held that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), because it was held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State v. Saxon,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski v. Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor v. Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to this Court's decision in *Brintley v. Michigan*); *Jones v. Commonwealth of Virginia,* 235 S.E.2d 313 (1977); *United States v. Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from other jurisdictions which it felt supported its view that the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State v. Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson v. State,* 386 N.E.2d 1185, 1193 (Ind. 1979); *State v. Frye,* 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs v. State,* 573 S.W.2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause.

In *Whack v. State,* 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (the state's highest court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment's prohibition against double jeopardy. The defendant's direct appeal to this Court is presently pending. *Whack v. Maryland,* No. 80-5492. Conversely, the Supreme Court of Delaware, in *Hunter v. State,* 420 A.2d 119 (Del. 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the first degree and the separate crime of possession of a deadly weapon during the commission of a felony. A petition for writ of ceriorari to the Delaware Supreme Court is presently pending before this Court in *Hunter v. Delaware,* No. 80-283, as well as in another Delaware case involving this same issue, *Evans v. Delaware,* No. 80-749 (requesting certiorari in *Evans v. State,* 420 A.2d 1186 (Del. 1980)).

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours II*: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court that they believed that as many as four-hundred to six-hundred prior convictions might be affected by the opinion." *Sours v. State, supra,* 603 S.W.2d at 599.

Every jurisdiction in this country is awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been determined and no further state grounds remain in the case. Finally, a decision is necessary because there exist decisions of this Court which conflict with the Missouri Supreme Court's decision in *Sours II.* Therefore, it is respectfully requested

that this Court issue the writs and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A-1

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 31,499

WILLIAM BROWN
Movant-Appellant,

v.

STATE OF MISSOURI,
Respondent.

OPINION FILED October 1, 1980

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
HONORABLE TIMOTHY D. O'LEARY, JUDGE

Before Turnage, P.J., Shangler and Manford, JJ.

William Brown filed a motion under Rule 27.26 to vacate sentences imposed following a plea of guilty. The trial court granted partial relief by vacating the sentence imposed, and resentenced Brown to the terms originally agreed upon after a plea bargain.

Brown appeals and contends the court erred in failing to vacate the sentence entirely because he was entitled to withdraw his guilty plea when the plea bargain was not honored by the court. Reversed.

William Brown entered a plea of guilty to robbery in the first degree and to armed criminal action. During

that plea Brown was interrogated both by his counsel and by the court to demonstrate that the plea was voluntary and intelligently made. No complaint is made on this appeal that the plea was not in fact voluntarily, intelligently and knowingly made. During that hearing Brown freely admitted a robbery by use of a knife. Brown's attorney brought out from Brown that a plea bargain had been entered into by which he was to receive a sentence of eight years on the armed robbery count and four years on the armed criminal action count with the sentences to run consecutively. The plea bargain was based upon the agreement that Brown would observe three conditions while he was free on bond pending sentencing. These were that he would commit no criminal offenses, that he would not contact the State's witness and that he would appear on the day set for sentencing.

Thereafter, Brown's counsel asked:

Q. So, you understand that if you don't abide by those three conditions, then the Judge is not committed to anything; he can give you two life sentences if he wants to, you understand that?

A. Yes.

Thereafter, on cross-examination by the prosecutor, Brown acknowledged that he accepted the conditions and that he realized if he violated any of the conditions he could possibly get two consecutive life sentences. Later, the court asked the following questions with the responses by Brown:

Q. If you commit any one of those three conditions, then my commitment is off and I can give you anything I want to, up to two consecutive life sentences. You understand that?

A. Yes.

Q. Now you're pleading guilty for two reasons. One, you did commit the robbery, using the robbery, using a knife, like you're charged with, didn't you?

A. Yes.

Q. And you are also pleading guilty because you know what I'm going to do to you?

A. Yes.

Q. And that includes the conditions that I have attached—

A. Yes.

Q. —which we have just talked about, do you underderstand that—don't you? It's all part of the same package. I've made a commitment to you as long as you keep your commitment to me; that is, that you show up, you don't commit any more criminal offenses and you don't contact Beverly A. Hwange. Okay?

A. Yes.

Q. Is there anything about any one of those three conditions that you feel that you cannot abide by?

A. No, sir.

Q. Any difficulty, at all, about abiding by any one of those three commitments?

A. No, sir.

Q. All right. Now, you know what will happen if you violate any one of the three don't you?

A. Yes.

Q. I'll use my own discretion at that time as to what the sentence will be and I'm not [sic] released from my commitment as far as I'm concerned and if you have any difficulty with accepting that, I

want you to tell me right now before I accept your plea of guilty.

A. No, sir, I don't have any difficulties.

Q. You're willing to accept that, so that sentencing will be deferred until December 27, 1978 so you can spend the next, approximately four weeks with your family, right?

A. Yes.

Brown appeared on December 27 as directed, but by agreement the sentencing was continued until January 5, 1979. Brown did not appear on January 5 and the court issued a warrant. Brown was later arrested under the warrant and appeared on March 30, 1979. At that hearing Brown acknowledged that he knew when sentencing was continued from December 27 to January 5 that the conditions he was to abide by continued in full force. Brown further acknowledged that he did not appear on January 5 and stated he had taken his family to Milwaukee because of some threats he had received. At that time the court stated:

> Now, my agreement with you, I think we went over it pretty good. My agreement with you was that if you appeared when you were supposed to, that you did not commit any other crime in the interim, or that you did not contact the State's witness, Beverly Wang (phonetic); that I would give you the sentence that I mentioned but if you did any one of those three things that I was released from my commitment and I could do anything I wanted to do, within the statutory limit, by law, which Robbery I is five to life and Armed Criminal Action is, what three to life?
>
> MR. ROGERS: (Brown's counsel) That's right, your Honor.

THE COURT: Am I correct on that?

DEFENDANT BROWN: Yes.

THE COURT: And you did not appear, did you?

DEFENDANT BROWN: No, sir.

The court continued sentencing until April 2, and at that time imposed a sentence of ten years on the robbery first degree count, and six years on the armed criminal action count, with the sentences to run consecutively.

In August, 1979, Brown filed the present motion under Rule 27.26. Counsel was appointed and a change of judge was taken from the judge who pronounced sentence. An evidentiary hearing was held and the court found that the three conditions imposed upon Brown's conduct while he was free on bond in the interim between the plea and sentencing was in reality conditions relating to his bond. The court held that Brown was entitled to the sentence agreed upon in the plea bargain, vacated the sentence imposed, and resentenced Brown in accordance with the original agreement.

Brown has appealed and now contends that under Schellert v. State, 569 S.W.2d 735 (Mo. banc 1978) he is entitled to withdraw his plea of guilty because the trial court did not sentence him in accordance with the plea bargain. On this appeal Brown argues that his plea was not voluntary because it was based on a plea bargain and since he did not receive the sentence agreed upon, his plea should now be held to be involuntary and he should be allowed to withdraw that plea.

There is no doubt that under *Schellert* any plea bargain entered into between the State and the defendant must be made known to the judge on the record and if the judge is not willing to abide by the terms of the bargain he must allow the defendant an opportunity to withdraw his

plea. However, that situation is not present in this case. Here it is clear the conditions imposed upon Brown were not part of the bond under which Brown was released pending the sentencing. Rather, it is clear the conditions of Brown's conduct were part and parcel of the plea bargain itself. It is abundantly clear that Brown, his counsel and the prosecutor, all understood and agreed the plea bargain to be that if Brown abided by the three conditions, then the sentence agreed upon would be imposed. It is likewise abundantly clear that all parties, including Brown, knew and acknowledged that if Brown violated any of the three conditions the bargain was off and sentence would be in the discretion of the court. The bargain was accepted by the court.[1] Thus, this is not a situation in which the trial judge refused to abide by a plea bargain. Rather, the situation here is one in which the court accepted the bargain and agreed to abide by its terms. The only violation of the bargain was by Brown when he admittedly violated one of the conditions of the bargain. Therefore, the question becomes whether or not Brown has a right as a matter of law to withdraw his plea when he violated one of the conditions of the plea bargain.

When the State desires to take advantage of the violation of a condition imposed upon a defendant in a plea bargain, it must prove by a preponderance of the evidence that the defendant has violated his part of the bargain. State v. Curry, 49 Ohio App.2d 180, 359 N.E.2d 1379, 1381 [1, 2] (1976). For this purpose the court must hold a hearing and the defendant has the right to call witnesses and to cross examine witnesses. State v. Warren, 124 Ariz. 396, 604 P.2d 660, 665 [2-7] (App. 1979). However, those

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1. Brown does not contend the court impermissibly participated in the plea bargain. The record shows the bargain was presented to the court after it was made and the court's questions to Brown were to insure that Brown understood the bargain.

rules do not apply in this case because Brown freely admitted that he did not appear for sentencing and that he knew the conditions remained in full force when the hearing was continued from December 27 to January 5. No question is raised on this appeal concerning the violation by Brown of that condition.

Brown's assertion that he is entitled to withdraw his plea completely overlooks the fact that under the plea bargain he undertook the obligation to abide by the three conditions and later violated one of them. As stated in In Re Troglin, 51 Cal.App.3d 434, 124 Cal. Rep. 234, 237 [3, 4] (1975):

> Well established is the rule that the People will be held strictly to the terms of the plea bargain made with a criminally accused. . . . It seems reasonable and just, at least where no public policy, or statutory or decisional or constitutional principle otherwise directs, that the accused also be held to his agreement.

Here it is only reasonable and just to hold Brown to the bargain he made with the court and the prosecutor. That bargain was that if Brown violated any of the conditions the court was free to sentence him to any term allowed by law. The court carried out the bargain actually made and Brown is in no position to complain. Indeed to allow him to prevail would be to hold that he could profit by his violation of the agreement and in effect obtain a reward for his own wrongdoing.

The court in considering this motion was in error when it held the conditions attached to the bond rather than the plea agreement itself. For that reason, the court erred in vacating the sentence actually imposed. The judgment on Brown's 27.26 motion is reversed and this cause is remanded with directions to enter a judgment denying

Brown's motion as to the judgment and sentence for robbery in the first degree. A conviction for armed criminal action arising out of a robbery has been held to constitute double jeopardy in Sours v. State, No. 61458, dated August 15, 1980, ... S.W.2d ..... (Mo. banc 1980).

The court is directed to enter judgment vacating the judgment and sentence in the armed criminal action count. State v. Leonard, No. 40108, dated August 26, 1980, ... S.W.2d ..... (Mo. App. 1980).

All concur.

William E. Turnage, Presiding Judge

Supreme Court No. 62636

IN THE SUPREME COURT OF MISSOURI
September Session 1980

Western District No. 31499
TRANSFER

William Brown,
Movant-Appellant,

vs.

State of Missouri,
Respondent.

Now at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1980, and on the 15th day of December 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, the 15th day of December 1980.

/s/ Thomas F. Simon, Clerk
/s/ Anne Berhost, D.C.

APPENDIX A-2

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 30966

STATE OF MISSOURI,
Respondent,

v.

DONNIE L. COLLINS,
Appellant.

OPINION FILED October 1, 1980

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE JAMES A. MOORE, JUDGE

Before Kennedy, P.J., Pritchard and Swofford, JJ.

Defendant Donnie L. Collins was convicted after a jury trial of the crimes of first-degree robbery and armed criminal action, in the armed robbery of one Payton Adams, III, at the Shannon Oil Company service station in Kansas City, Missouri, on September 23, 1978. He was sentenced to ten years' imprisonment on each count to be served concurrently.

The appeal raises two evidentiary points. We affirm the judgment of first-degree robbery. For reasons hereafter noted, we reverse the armed criminal action judgment of conviction.

The first point raised by appellant is the overruling by the court of his pre-trial motion to suppress the in-court identification of defendant by one Roy Rodriguez.

Rodriguez was a fellow employee with Adams at the service station. Driving by the station shortly before 5 o'clock the afternoon of the robbery he saw a man - later found to be Ronald Johnson, an accomplice of the defendant in the robbery - pumping gas at the station. It didn't "look right", so he drove his truck into the station. The defendant emerged from the station and walked to Rodriguez' truck. He told Rodriguez, in answer to his question, that the gas attendant had to leave on an emergency, and had been replaced by Thelma, another employee, and Bob Morlock, the owner of the station. Defendant said that Tommy Lee Beaver, brother to Thelma, had left him in charge. He then ordered Rodriguez out of the truck and as Rodriguez testified, "told me he was going inside and talk about it". By this time Ronnie Johnson, the man whom Rodriguez had first observed pumping gas, had come to the truck. Rodriguez produced a pistol and ordered both men to put their hands on the truck. Johnson did so, but defendant Collins did not. "He kept trying to make a play for his back", Rodriguez said, "so we stood there and talked about, anywhere from 10 to 15 minutes". Rodriguez saw a handgun stuck in the middle of defendant's back as he turned, and he took the gun from the defendant. Defendant then ran. The time was shortly after 5 o'clock p.m.

At this point Adams, tied hand and foot, came hopping out of the service station. The police arrived within five minutes. Rodriguez turned over to the police his prisoner, Ronald Johnson, and the gun which he had taken from defendant Collins.

About two hours later Rodriguez went to the police station to observe a lineup. Defendant Collins had been arrested and was in the lineup. Rodriguez immediately identified him.

Defendant's first point is that the lineup was impermissibly suggestive, and the in-court identification should therefore have been quashed. Defendant claims the other two subjects in the lineup were markedly different from him in appearance. Defendant was five feet nine inches tall and was twenty-four years of age. One of the other men in the lineup was twenty-five years of age and was six feet one inch tall, while the third subject was five feet two inches tall, heavy set, and was seventeen years of age.

The lineup could not have contributed to any misidentification by the witness Rodriguez. The witness Rodriguez had talked with the defendant face to face for at least ten minutes in outside daylight. There can be no doubt that all his senses were alert during the conversation. It was only two hours until he saw the defendant at the police station where he identified him. He stated that he recognized the defendant by his facial features and also by scratches on his neck. The witness had a sound, independent basis for identification and the trial court was entirely correct in overruling the defendant's motion to suppress Rodriguez's in-court identification of the defendant, and in allowing Rodriguez to testify to defendant's identity as one of the persons who perpetrated the crime. Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); State v. Terry, 582 S.W.2d 337 (Mo. App. 1979).

Defendant's second point is that the court erred in allowing Police Officer Lawrence E. Sherrard to testify as follows:

Q. Upon your arrival did you find that there was a Ronald Johnson there (at the Shannon Oil Company) under arrest?

A. Yes, I did.

Q. After you talked to Mr. Johnson, where did you respond?

A. I responded to 3528 South Benton.

Q. And whose address is that?

A. Donnie Collins.

Collins was found at the address and was arrested. Defendant argues that the plain implication of this testimony was that Johnson told Officer Sherrard that defendant Collins was the other robber, and that such testimony is condemned by State v. Kirkland, 471 S.W.2d 191 (Mo. 1971), as hearsay.

In *Kirkland,* however, the speaker (corresponding to Johnson in the present case) was not called as a witness by the state. Her identification of the defendant to the police officer was vital to the identification of the defendant in that case. "As to this issue", the court said, "the truth of the matter asserted is of prime importance and defendant was entitled to cross-examine the person upon whose credit the matter was asserted as being the truth . . ." *Id.* at 194.

The important difference between the *Kirkland* case and the case now before us is that here the speaker did testify as a witness by the state. Johnson testified that the defendant Collins and he had perpetrated the robbery with which defendant Collins was charged. Furthermore, there was the positive identification by Payton Adams and by Roy Rodriguez. The identification of the defendant as the robber was thus fully established.

If the identification of defendant Collins as the other robber was inferred by the jury from Sherrard's testimony of his arrest of defendant after talking with Johnson, and if it was therefore inadmissible hearsay, it was merely

cumulative and was harmless. State v. McMillan, 593 S.W.2d 629, 633, 634 (Mo. App. 1980).

We *sua sponte*, under the plain error rule, Supreme Court Rule 84.13 (c), State v. Williams, 595 S.W.2d 378, 379 (Mo. App. 1980), take note that defendant was convicted of first-degree robbery under §§ 560.120 and 560.135, RSMo 1969,[1] and of armed criminal action under § 559.225, RSMo Supp. 1976. For the two offenses he received separate sentences of ten years, to be served concurrently. During the pendency of this appeal it has become settled in Missouri that the armed criminal action conviction upon proof of the same facts as the first-degree robbery conviction constitutes double jeopardy in violation of defendant's constitutional rights. Sours v. State, ... S.W.2d ..... (Mo. banc 1980) [No. 61458, filed August 18, 1980]; Sours v. State, 593 S.W.2d 208 (Mo. banc 1980).

The latter decision is retroactive in its effect and it renders void the armed criminal conviction in the present case. Robinson v. Neil, 409 U.S. 505 (1973); Burrow v. White, Order and Writ of Habeas Corpus, filed May 1, 1980 (Mo. banc).

The armed criminal action conviction is therefore reversed, and the case is remanded to the trial court to vacate and set aside that conviction, judgment and sentence.

The first-degree robbery conviction and judgment are affirmed.

All concur.

Don W. Kennedy, Presiding Judge

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1. The information charged that the robbery was accomplished "with a dangerous and deadly weapon, to wit: automatic pistol, loaded with gunpowder and leaden balls . . ."

Supreme Court No. 62637

IN THE SUPREME COURT OF MISSOURI
September Session, 1980

Western District No. 30966
TRANSFER

State of Missouri,
Respondent,

vs.

Donnie L. Collins,
Appellant.

Now at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1980, and on the 15th day of December 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, 15th day of December 1980.

/s/ Thomas F. Simon, Clerk
/s/ Anne Berhorst, D.C.

APPENDIX A-3

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 31117

STATE OF MISSOURI,
Respondent,

vs.

EDDIE LEE GREER,
Appellant.

OPINION FILED November 3, 1980

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE LOUIS LOMBARDO, JUDGE

Before Turnage, P.J., Shangler and Manford, JJ.

This is a direct appeal from convictions for two counts of kidnapping, two counts of rape, two counts of sodomy and two counts of armed criminal action. The jury assessed punishment of six hundred twenty years imprisonment. The judgment is reversed in part and affirmed in part.

Appellant presents three points of error, which in summary allege (1) the trial court erred in failing to dismiss the two counts of armed criminal action because said counts placed appellant in double jeopardy; (2) the trial court erred in compelling appellant to be fingerprinted because, although requested, appellant received no evidentiary hearing pursuant to Rule 25.35; and (3) the trial court erred in admitting both the out-of-court and in-court identifica-

tion of appellant because the identification was the result of impermissible suggestion by hypnosis, and apart from any suggestiveness, identification premised upon hypnosis is inherently unreliable and violates appellant's rights to constitutional due process.

On November 1, 1977, at about 7:30 p.m., two teenage girls drove to a local record shop in Kansas City, Missouri. They were in the record shop for about 15 minutes and departed early because while inside, they noticed a black male staring at them. The girls rushed to their stationwagon, which was parked and locked on a side street. As the one girl (driver) was unlocking the stationwagon and opening the right front door for the other girl, a white automobile with four or five black males inside backed up alongside the stationwagon. A voice from inside the white automobile asked the girls, "How are you doing tonight?" The girls did not respond. As the girls got into the stationwagon, appellant, with a gun, forced his way into the stationwagon on the passenger side. Appellant pointed the gun at the girls and made them drive through an alley where another black male was located. This second man knocked on the window of the stationwagon and entered the stationwagon. At this point, the girls were forced to move to the rear seat with appellant. Appellant ordered the girls at gunpoint to lay their heads on his lap. The other black male drove the stationwagon. While they were riding and in this position, appellant ordered one of the girls to unzip his pants and appellant placed his hand inside her pants.

After a ride lasting approximately 10-15 minutes, the girls were taken inside a house. Appellant and the other black male were joined in the house by three or four more black males. At gunpoint, the girls were ordered to disrobe. They were told if they did not disrobe, they would be

shot or killed. After they had removed their clothing, the girls were subjected to multiple and simultaneous acts of vaginal, oral and anal sexual assault by appellant and the other four or five black males in the house. The girls were then ordered to dress, and after doing so, were told to undress, and repeated sexual assaults again occurred. After the second assaults, the girls were taken back to their stationwagon by appellant and another black male. They were ordered to lay on the back seat and from that position, neither girl could observe their location. The time at this point was approximately 11:00 p.m. as the radio was on in the stationwagon and the hour was announced. After driving a short period of time, appellant and the other black male abandoned the girls in the stationwagon. The girls lay on the back seat for about 45 minutes, as appellant had told them to do, because he was going to talk to someone and would return in about 20 minutes. When the girls realized the two black males were gone, they jumped in the front seat and drove the stationwagon away. While driving away, the girls became involved in a collision with another vehicle. They asked the driver of the other vehicle to take them to the hospital. This other driver took the girls to Menorah Hospital. At the hospital, the girls met with a policeman, who transported them to St. Luke's Hospital. At approximately 1:00 a.m., a medical examination was performed on both girls. The medical examination revealed seminal fluid with live sperm in both of the girls and the fact that sexual intercourse had occurred.

While at St. Luke's Hospital, the girls described their abductor as a negro male about 30 years of age, five foot six, 150 pounds, of stocky build with a mustache and afro hairdo of medium length. They said he was wearing a black hat and white coat and was armed with a silver-colored handgun.

An investigation was launched, which resulted in an indictment charging appellant with kidnapping, rape, sodomy and armed criminal action. Numerous pretrial motions were filed and hearings held thereon. Appellant presented an alibi defense. The jury entered its verdict and following the overruling of appellant's motion for new trial, this appeal followed.

Turning to appellant's point one, this court is required to determine whether or not appellant was placed in double jeopardy by being charged with kidnapping (two counts because there were two victims) by and through the use, aid and assistance of a dangerous and deadly weapon; and by the use, aid and assistance thereof, he was charged with two counts of armed criminal action.

Appellant was charged with kidnapping in violation of §559.240, RSMo 1969, the pertinent part of which reads:

> "*559.240. Kidnapping.*—1. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years."

Because appellant kidnapped the two girls at gunpoint, he was charged with two counts of armed criminal action in conjunction therewith. These two counts were premised upon violation of §559.225, RSMo Supp. 1976, which reads:

> "*559.225. Armed criminal action—penalty—exceptions.*—1. Except as provided in subsection 4 of this section, any person who commits any felony under

the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole,

probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

The issue of double jeopardy arises, of course, from and as a result of the decision by our State Supreme Court in Sours v. State, 593 S.W.2d 208 (Mo.banc 1980). It is not necessary to reiterate the details of *Sours,* but it suffices to state that the conviction of Sours for robbery, first degree and armed criminal action was held to have subjected Sours to conviction and punishment twice for the same offense, thereby placing Sours in double jeopardy and violating his constitutional rights.

Following the vacating of *Sours* by the United States Supreme Court in light of Whalen v. United States, ... U.S. ....., 100 S.Ct. 1432 (1980), and a remand to our State Supreme Court (see Missouri v. Sours, No. 79-1565 [U. S., filed May 27, 1980]), a second opinion was issued by our State Supreme Court which resulted in the reinstatement and supplement of its original opinion, see Sours v. State, No. 61458 (Mo.banc, filed August 18, 1980).

Reduced to its simplest form, the entirety of this issue rests upon the answer to the following questions: Does *Sours* prohibit punishment for armed criminal action and an "underlying felony" when such felony is robbery in the first degree *only*? or Does *Sours* mandate a broader application which results in the prohibition of punishment for armed criminal action in conjunction with any "underlying felony" upon which the armed criminal action is based?

Our State Supreme Court, in the original *Sours* decision, concluded that robbery, first degree and armed crim-

inal action are the same offense regarding double jeopardy and that punishment for both, whether occurring in a single proceeding or successive proceedings is prohibited. Our State Supreme Court took from and applied the "same offense test" expressed in Blockburger v. United States, 284 U.S. 299 (1932). The court, in *Blockburger*, declared at 304:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

In *Sours*, our State Supreme Court concluded that §559.225 does more than enhance the punishment for the underlying felony. Rather the court concluded that the statute required two sentences for two crimes (i.e., robbery, first degree and armed criminal action). Our State Supreme Court concluded that armed criminal action and the underlying felony constituted only one offense and not two, and in applying the "same offense test" from *Blockburger*, further and finally concluded that "conviction for both robbery first degree and armed criminal action places a defendant twice in jeopardy by multiplying the punishment for one offense," *Sours*, 593 S.W.2d at 222.

The United States Supreme Court then handed down its decision in *Whalen v. United States, supra.* *Whalen* reversed a conviction for rape and felony murder (the murder having been committed in perpetration of the rape). The United States Supreme Court concluded the rape and the felony murder were the "same offense", applying *Blockburger*, and declaring, "proof of rape is a necessary element of proof of the felony murder". *Whalen* at 1439. The United States Supreme Court then vacated

Sours in light of the *Whalen* decision and *Sours* was remanded for reconsideration by our State Supreme Court.

Upon remand, our State Supreme Court interpreted *Whalen* in a very narrow context. In the second *Sours* decision, our State Supreme Court held that *Whalen* failed to answer the question of whether legislative intent regarding imposition of multiple punishments for the same offense violated the prohibition against double jeopardy. Our State Supreme Court construed *Whalen* as having only reached the question of whether or not, by statute, the legislature intended multiple punishment for the same offense. Our Supreme Court found that the United States Supreme Court concluded in *Whalen* that the legislature did not intend multiple punishments for the same offense, but that *Whalen* did not address or provide any direction relative to the constitutional question of double jeopardy. From this conclusion, our State Supreme Court felt obligated to again look at §559.225 with regard to the legislative intent therein and without any direction or guidance from *Whalen.*

In its second consideration of *Sours,* our State Supreme Court applied the "same offense test" in *Blockburger* and concluded that the language of the armed criminal action statute, §559.225, and the statute defining the underlying felony (robbery first degree) "plainly" do not "require proof of a fact which the other does not . . ." Sours v. State, No. 61458, slip op. at 9 (Mo.banc, filed August 18, 1980).

Whalen declared that the court should presume that cumulative punishments were not intended by the legislature where the same offense is involved, unless a contrary intent exists. In *Sours,* our State Supreme Court found that the Missouri legislature did intend to authorize conviction and punishment for both armed criminal action

and the underlying felony. Having reached that point, our State Supreme Court proceeded to decide the proposed constitutional issue of double jeopardy. This conclusion departs from *Whalen,* for in *Whalen,* the court had not found such legislative intent.

In its second *Sours* decision, our State Supreme Court adopted its analysis from its first *Sours* decision and held thusly, at pp. 18-19 of its opinion:

> "The double jeopardy clause of the fifth amendment to the United States Constitution prohibits the state from punishing a person twice for the same offense . . . (citations omitted) . . . Armed criminal action and the underlying felony used to prove armed criminal action—in this case, robbery first degree—are the same offense for double jeopardy purposes under the same evidence test, because it is not the case that proof of robbery requires proof of any fact not also required to prove armed criminal action . . . (citations omitted) . . . Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and for the underlying felony."

The result in the second *Sours* decision was the vacating of appellant's conviction for armed criminal action and the reinstatement of the original *Sours* decision as supplemented.

The instant proceedings require this court to interpret *Sours* and to determine the extent of its applicability regarding felonies other than the felony of robbery, first degree, hence the question above as to whether or not, for purposes of double jeopardy, punishment for armed criminal action is restricted to robbery, first degree. The instant proceedings also require this court to determine whether or not *Sours* mandates a broader application,

resulting in the prohibition of punishment for armed criminal action in conjunction with any "underlying felony" upon which the armed criminal action is based.

This court is bound to follow the mandate of our State Supreme Court. This court concludes that the prohibition mandated in *Sours* applies to all underlying felonies and is not limited or restricted to the felony of robbery, first degree. This conclusion is reached for the following reasons and upon the following analyses.

In the first instance, our State Supreme Court, in both *Sours'* opinions, speaks in general terms about armed criminal action and the "underlying felony". Both opinions only occasionally specify the particular felony involved, to wit, robbery in the first degree. In substance, both opinions, in speaking of the "underlying felony" do not limit the effect of the opinions to robbery, first degree. For example, in the first *Sours* opinion, the court declared:

> "We find that armed criminal action and the underlying felony, in this case robbery first degree are the 'same offense' for double jeopardy purposes." *Sours,* 593 S.W.2d at 210

In its second decision, at pp. 8, 9, 12 and 19 of the opinion, the State Supreme Court stated:

> "Applying *Blockburger* as a rule of statutory construction to the armed criminal action statute and the statute defining *the underlying offense, in this case robbery first degree statute* . . . §559.225 . . . plainly authorizes punishment both for armed criminal action and *for the underlying felony* . . . Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and *for the underlying felony.*" (emphasis added)

In addition, if the "same offense test" in *Blockburger* were applied as it was in *Sours,* the result reached would be the same, whether applied in those cases where the underlying felony is robbery, first degree, or as in the instant case, the underlying felony is kidnapping, or to any case involving any specific underlying felony and armed criminal action arising out of that felony. Further, *Sours* has held that the offense of armed criminal action, by definition, includes the underlying felony, in turn defining the underlying felony as a lesser and included offense. Still further, *Sours* mandates, for the purposes of double jeopardy, that a greater offense is the "same" offense. This was expressed in *Sours* as follows:

> "The crime of armed criminal action consists of two features: (1) any felony, and (2) the use of a dangerous and deadly weapon in the commission of (1). The first feature may be any one of a class of offenses, each of which consists in turn of several elements. If (1) specified a single felony, it would be obvious that armed criminal action includes all of the elements of the felony specified . . . the result is no different where the statute refers to 'any felony'. Proof of armed criminal action still 'cannot be had without' proof of the underlying offense. *Harris* stands for the proposition that when a statute defines a crime as 'any felony' plus other elements, proof of the particular felony involved is required to prove that crime . . . Thus . . . armed criminal action and the underlying felony constitutes only one offense and not two." *Sours,* 593 S.W.2d at 219-220

In its *Sours* decision, our State Supreme Court mandated that §559.225 be construed as if the sentence, "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the

crime committed by, with or through the use, assistance or aid of a dangerous or deadly weapon," were in fact stricken from each subsection of §559.225.

In applying the foregoing analysis of *Sours,* this court concludes that the prohibition premised upon double jeopardy is not limited or restricted to the felony of robbery, first degree, but applies to any underlying felony. For and upon the foregoing reasons, point one raised by appellant is sustained and the convictions are reversed. The sentences affixed pursuant thereto are held to be void.

In point two raised by appellant, the record reveals that during the pretrial hearings on appellant's motions to suppress, respondent filed a motion to compel the taking of appellant's finger and palm prints pursuant to Rule 25.35[1]. Prior to the filing of the written formal motion, respondent, in the presence of appellant's counsel, informed the court that the motion was being filed to avoid transporting a former police officer who, at the time of trial, was a resident of California. This police officer had previously taken appellant's fingerprints while an officer in the State of Illinois. At this juncture, appellant's counsel responded, "I will . . . I would anticipate the hearing on that motion would be less than 10 minutes."

The written motion was filed when the court reconvened. Respondent explained to the court the great expense involved in bringing the former police officer from California. Respondent also explained that since appellant was fingerprinted in Illinois as a result of another criminal charge, the production of the prints obtained in Illinois might suggest to the jury appellant's involvement in other criminal activities.

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1. Now Rule 25.06(c).

Appellant opposed the motion, stating it was his understanding that Rule 25.35 required a hearing with production of evidence. Appellant further claimed the state was required to show why prints were necessary and what difficulties would be encountered by offering the prints, as they were possessed by respondent. Respondent had the master card of the prints taken in Illinois. Appellant further argued that prints need not be taken because respondent had the master card, that the situation should have been apparent to respondent prior to the day before trial and that the prints could be introduced by use of the master card in such manner as to avoid reference to appellant's involvement in other criminal activity.

After listening to counsel for respondent and appellant, the trial court entered the following order:

"Now on the 4th day of June, 1979, plaintiff presenting to this court good cause, the Court orders that the inked impressions requested in the State's Motion to Compel the Taking of Defendant's Fingerprints and Palmprints, be taken from Defendant Eddie L. Greer in a manner agreed on by the State and Defendant."

Appellant claims that Rule 25.35 (now 25.06), particularly subsections (C) and (D) were not complied with. The pertinent portions of this rule are:

> "(B) Upon motion by the state, and subject to constitutional limitations and other safeguards deemed appropriate by the court, and upon a showing of good cause, the court may order the defendant to: . . . (3) Be fingerprinted . . .
>
> (C) If requested by any party, the court shall hear evidence on the necessity of discovery requested under Rule 25.06(B).

(D) In its order directing discovery under this Rule, the court shall make the grounds for its decision on a part of the record."

Rule 25.35, predecessor to Rule 25.06, became effective on July 1, 1974 and since its inception, no case has construed the rule.

When appellant was advised the motion was going to be filed, appellant did not anticipate any lengthy consideration of the motion. The record, when viewed in total, reveals that appellant had no real objection to it and in fact argued the master card from Illinois could be introduced in such a manner as to avoid alerting the jury that he was involved in other criminal activity.

Respondent pointed out to the trial court that one of the main reasons for requesting appellant's fingerprints, and hence discarding the use of the Illinois master card, was to safeguard appellant. Appellant cannot be heard to complain upon alleged noncompliance of the rule on that basis because, as a result of the request and the subsequent order by the trial court, he was afforded greater protection of his rights to a fair trial. Further, if the state were to have offered evidence upon the reasons for the fingerprints, the motion would have been granted. Conversely, if the state were unable to produce evidence upon the motion, the prints via the Illinois master card would have been produced. The result of the trial court's action was to protect appellant from potential prejudice which might have arisen if the Illinois master card had been produced, indicating other criminal behavior. The bare assertion of no evidentiary hearing, contrasted with the facts and circumstances of the instant case, shows this argument to be without merit.

Appellant also argues that the court did not state grounds for its decision as required by the rule (see Rule

25.35[D] above). That portion of appellant's argument fails for two reasons. The order declares that respondent presented to the trial court "good cause" in support of the motion. It must be pointed out that the order followed argument by both parties wherein the reasons (i.e., transport of a former police officer and the possible prejudice to appellant by use of the Illinois master card) had been presented. Those factors and review of the entire record upon this point do not lead to the conclusion that the trial court's failure to further specify the reasons for its order is tantamount to noncompliance with the rule. In addition, no objection to the trial court's order was raised at trial and such issue is first raised upon this appeal. No mention or challenge of the order as violative of Rule 25.35(D) was made in appellant's motion for new trial. Nothing on this point was preserved for review, see Rule 29.11(d) (formerly rule 27.20); State v. Martin, 451 S.W.2d 96 (Mo. 1970) and State v. Holmes, 439 S.W.2d 518 (Mo. 1969).

For the foregoing reasons, point two is ruled against appellant.

Disposition of appellant's final alleged error necessitates interrelated consideration of appellant's pretrial motion to suppress evidence and the evidence developed upon trial. Appellant argues that identification of appellant was not admissible because such identification was the result of impermissibly suggestive hypnosis and, even if there were no impermissive suggestions, the process of identification resulting from hypnosis was inherently unreliable.

Our courts have spoken to the issue of impermissible suggestive identification. The latest authority presenting the analysis to be applied is State v. Higgins, 592 S.W.2d 151 (Mo.banc 1979). *Higgins* involved pretrial identifica-

tion by use and the viewing of photographs. Our State Supreme Court held at 159 the danger to be guarded against is any procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable misidentification*". (emphasis added)

In determining whether such a danger exists, our courts must look to the totality of the surrounding circumstances, see Simmons v. United States, 390 U.S. 377 (1967) and Stovall v. Denno, 388 U.S. 293 (1966). In weighing the matter, two questions arise and were present in the *Higgins* case. These are: Were the investigative procedures employed by the police impermissibly suggestive? If so, were they so impermissibly suggestive as to create a very substantial likelihood of an irreparable misidentification at trial. See *Higgins, supra,* at 159.

It has been held that even if the procedures were impermissibly suggestive, identification testimony may nevertheless be admissible if it is reliable. The necessary reliability is to be determined from the "totality of the circumstances". Those factors to be considered in determining reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation". Neil v. Biggers, 409 U.S. 188, 199 (1972). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself," see Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

The victims in the instant case were kidnapped, raped and sodomized the night of November 1, 1977. These events occurred between 7:00 p.m. and 11:00 p.m. While at the hospital, late the same evening and into the early

morning hours of the next day, the victims provided a police detective with a description of the suspect who had kidnapped them at gunpoint and who had participated in the subsequent offenses. They described a "Negro male about 30 years old, five foot six, 150 pounds, stocky build, wearing a black hat, armed with an unknown type handgun, silver color, reported to have a mustache, medium length afro hairdo and wearing a white coat."

On November 4, 1977, in separate sessions, the victims were hypnotized by Dr. Marshall Saper, a local psychologist. Dr. Saper testified that he had training in the use of hypnosis and had used hypnosis periodically in his therapy work and in police cases (in his capacity as a reserve police officer). The hypnosis sessions were attended by two police officers, but neither participated in the sessions other than to observe. Dr. Saper testified the hypnosis was note to improve the victims' recollection, and stated that once a state of relaxation and concentration is achieved, the person is taken back in time to the incident in question and asked to describe what they see and hear. The person in such a state is fully awake and conscious of his or her surroundings.

Dr. Saper testified that the victims in the instant case achieved this conscious state of hypnosis. Dr. Saper admitted that once under hypnosis, a subject is open to suggestions. Dr. Saper then testified that "once the subjects were under hypnosis, no suggestion was given to them of any kind by me. The only suggestions given were to get them into hypnosis and that involved suggestions to relax, to imagine a feeling of warmth, to imagine a feeling of relaxation." Dr. Saper stated that prior to the hypnosis session, he did not know what the initial interrogation by police officers had revealed. He did testify, however, that following the session, a detective did tell him that

the police had come up with more information than they had prior to the session.

One of the detectives attending the hypnosis session testified that both victims gave the description that their abductor was ". . . around 30, heavy build, but wasn't fat . . . something very strange about his eyes, almost Oriental or Egyptian . . . he had very slight fingers and wore no jewelry . . . he wore a black hat."

Subsequent to the hypnotic sessions, a police artist made a composite drawing from the description provided by one of the victims. This composite was made while the victim was not under hypnosis. This officer testified that the description given for the composite was the same given by this victim during the hypnosis session which he attended. He was the second officer during the hypnosis session.

On November 18 or 19, 1977, the victims were shown an array of photographs, appellant's photo was not among this array, and no identification was made. On November 22, 1977, another array of photographs (13 altogether) was shown to the victims. The photographs were an admixture of color and black/white photographs. Of the 13, a total of four were of the appellant. The victims were separated, the photographs shuffled and handed to the victims. Independently, the victims identified appellant and two others. One victim's identification was positive. The trial revealed the other victim stated she would have to hear appellant's voice to be completely certain. The record shows this second victim did identify appellant's voice when appellant made a spontaneous outburst during trial.

On December 29, 1977, the victims, accompanied by a female police officer and a female assistant prosecutor,

traveled to Murphysboro, Illinois, where appellant was in the custody of Illinois authorities. The victims observed appellant, separately, through the window in a courtroom door. Appellant was inside the courtroom with seven other black males. Each victim was asked to view the men inside and then independently mark on a piece of paper the person they could identify, if anyone. Independently, and without suggestion from authorities or as a result of any conference between them, the victims identified appellant. One victim made a positive identification and the other victim made a tentative identification. The tentative identification was made subject to the second victim hearing appellant's voice as referred to above.

The foregoing evidence was before the trial court on appellant's motion to suppress. The motion was overruled.

Trial commenced and both victims testified appellant did not attempt to conceal his face; that they saw his face as he forced his way into their stationwagon and at the house where the assaults were committed upon them. They were questioned about their being blindfolded and both testified they were not blindfolded until after they were ordered to disrobe. One victim testified to being able to see through the sweater which was used as the blindfold on her. Both victims made positive identification of appellant in the courtroom. The second victim became positive in her identificaiton after hearing appellant's voice during an outburst by appellant during trial. Both victims testified to being able to identify appellant from the photographs and the lineup.

In resolving appellant's point three, this court must answer four questions which arise as a result of appellant's argument. First, was the hypnosis impermissibly suggestive and as an adjunct thereof, does hypnosis render

identification inherently unreliable? Second, was the line-up impermissibly suggestive? Third, was the photographic display impermissibly suggestive? Fourth, disregarding suggestiveness, were the identifications reliable?

Regarding question (1) above, appellant argues that hypnosis is "inherently susceptible to the process of suggestion and to the misperception of reality". He further argues that in the instant case, the hypnosis was "impermissibly suggestive because the girls' prehypnosis description was not lacking in detail." In his argument, appellant states "the hypnotic sessions . . . did not reveal any description significantly different or more detailed" than what was given prior to the hypnosis.

The precise question of hypnosis is unique in our state, so this court must look to other jurisdictions for consideration of the question. The majority view holds that pretrial hypnosis does not, as a matter of law, render resulting identification and testimony related thereto inadmissible. The line of authority admitting such evidence reasons that hypnosis aids recall, and later identifications are made from refreshed recollections. Such recollections have been likened to much the same as memories refreshed by diaries, memos and the like. This line of authority also concludes that the effect of the hypnosis is a matter to be weighed by the trier of fact.

A case which takes up the issue of pretrial identification procedure in particular is People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643 (1979). The case involved a rape victim unable to recall anything about a rape and an assault. The victim was hypnotized and thereafter, able to recall details of the attack and the name of her assailant. The opinion provides a detailed explanation of hypnosis, its history and describes the growing use of hypnosis in criminal investigation. The New York Court

stated that in civil cases, hypnosis has been held only to affect the weight of the evidence and that criminal cases dealing with the admissibility of a witness in a criminal case subsequent to hypnosis seem to follow the civil approach. In *Hughes,* at 648, the court concluded, ". . . that testimony, which is hypnotically induced recollection, is not inadmissible as a matter of law. Given a proper foundation of general acceptance in the scientific community and adequate procedural safeguards to insure reliability, this court believes that evidence elicited through hypnosis can be valuable to the determination of the guilt or innocence of those who have been accused of crimes."

For other authority supporting the acceptance of testimony following hypnosis, see State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971), which held that hypnosis goes to the weight of the testimony; People v. Smrekar, 68 Ill.App.3d 379, 24 Ill.Dec. 707, 385 N.E.2d 848 (1979), which held that hypnosis goes to the weight of evidence where (1) the hypnotist was shown to be competent; (2) the evidence reveals no suggestion employed during hypnosis session; (3) other substantial evidence corroborated identification and (4) witness had ample opportunity to view assailant at the time of the occurrence; Clark v. State, 379 So.2d 372 (Fla.App. 1979) which held that testimony goes to the weight thereof since it is made upon "present recollection refreshed"; Harding v. State, 5 Md.App. 230, 246 A.2d 302 (1968), cert. denied, 395 U.S. 949 (1969), which held it is a matter of weight of testimony; United States v. Adams, 581 F.2d 193 (9th Cir. 1978), cert. denied, 439 U.S. 1006 (1978), which held that failure to disclose hypnosis is a basis for reversal; United States v. Awkard, 597 F.2d 667 (9th Cir. 1979), cert. denied, 444 U.S. 885, 969 (1979), which held that it goes to weight, if disclosed to the jury; State v. Hurd, 173 N.J. Super. 333, 414 A.2d 291 (1980), which held that such evidence is admissible if

procedural safeguards are followed so that no impermissible suggestion is allowed; State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978) which held that the credibility of such evidence is for the jury to determine; and United States v. Narciso, 446 F.Supp. 252 (E.D. Mich. 1977), which held that the possibility of misidentification is not sufficient grounds for exclusion of such evidence where defendant failed to prove "very substantial likelihood of irreparable misidentification".

As contrasted with the above line of authority during oral argument of the instant case, appellant brought to this court's attention the case of State v. Mack, 292 N.W. 2d 764 (Minn. 1980). The court in *Mack* applied the rule in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), with the result being that Minnesota holds that testimony of a previously hypnotized witness is inadmissible as a matter of law. The Minnesota court in *Mack* refers to the entry of the victim into a "deep hypnotic state" and expresses concern over the possibilities of prehypnotic and posthynotic status. In *Mack,* the court simply refuses, under *Frye,* to accept the value of hypnosis as a matter of law.

With the foregoing authority as a background on this issue, pertinent facts in the instant case must again be referred to as they relate to the disposition of this issue. The record shows that both victims had separately and independently given a description of their abductor prior to any hypnotic session. There was no suggestion of any detail, event, persons or any other specific or general reference to the matter and the information given by the victims was their own statement. The most significant factors which distinguish the prehypnotic session related to the identification of appellant, and those details given during the hypnotic session were the added

features of "Oriental or Egyptian eyes, broad flat nose, heavy lips, very slight fingers and no jewelry". Appellant admits that the hypnotic session did not produce a description "significantly different or more detailed" than that previously given.

There is nothing in the instant case which supports appellant's contention that any impermissible suggestion occurred which would result in a "very substantial likelihood of irreparable misidentification". Further, the record of this case supports the in-court identification of appellant by both victims upon present recollection. Appellant made no attempt to conceal his identity at the time of abduction, during the entry into the place where the sexual acts occurred, or during departure from said location. The only questionable period of time regarding the continued possible observation of appellant by the victims is during the time they were blindfolded and assaulted. Even in the latter instance, one victim was able to see through her blindfold during the actual sexual assaults.

Appellant pursues his argument further and attacks the photographic array wherefrom appellant's photograph was selected separately and independently by both victims. The victims were shown an array of photographs on two separate occasions. In the first instance, no selection was made by either victim, but appellant's photo was not among the array. On the second occasion, the victims separately viewed 13 photos. Of this group, appellant appeared in four photos. The victims, without conference with each other, independently identified appellant from the photographic array. While no case involving the precise factual situation has been found, it has been held that the showing of only one picture of an accused to a witness was not improper, see State v. Parker, 458 S.W.2d 241 (Mo. 1970) and State v. Greenlaw, 593 S.W.2d 641 (Mo. App. 1980). There is nothing upon the record of the in-

stant case which shows anything other than the fact that a multiple number of photographs were shown to the victims who in turn independently identified appellant from the photographs. There is nothing of record in the instant case to support appellant's contention that such photographic array was in any manner impermissibly suggestive and such argument is found to be without merit.

Appellant argues still further that the lineup from which both victims separately and independently identified him was impermissibly suggestive. Appellant had been arrested and was in custody in Murphysboro, Illinois. The victims traveled to the courthouse in Murphysboro. The victims observed appellant, along with seven other black men, through a window in a courtroom door. The victims were separated to prevent discussion or comparison between them for purposes of identification. Each victim was given a piece of paper and asked to place a number on the paper if they identified any of the persons inside the courtroom. As the persons were so aligned inside the courtroom, appellant was number four from the left and each victim separately and independently marked that number on their respective pieces of paper.

Appellant argues that he was the shortest of the eight men in the courtroom and the manner in which the eight were located formed a "V" shape with the base of the "V" pointing to appellant, directly implicating him. The facts on the record dispel appellant's contention. In the first instance, three of the other seven men were nearly the same height as appellant. In addition, the record reveals that while from left to right the heights of the individuals descended down to appellant, the persons on appellant's far right did not ascend in any order of height toward the location of appellant. It has been held that dissimilarity in height does not provide sufficient basis to hold that a lineup was permissibly suggestive, see State v. Gant, 586

S.W.2d 755 (Mo.App. 1979); State v. Bivens, 558 S.W.2d 296 (Mo.App. 1977) and Gaitan v. State, 464 S.W.2d 33 (Mo. 1971). There is no merit to appellant's argument that the identification of appellant was unreliable because the lineup was impermissibly suggestive.

There is nothing upon the record of this case to support appellant's contention that the identification of appellant was unreliable upon the premise of impermissible suggestiveness. Appellant's argument that employment of hypnosis rendered all identification unreliable is by this court rejected. It is the opinion of this court that absent the showing that use of hypnosis was impermissibly suggestive so that "a very substantial likelihood of irreparable misidentification" occurred, the evidence based thereon was not inadmissible as a matter of law, but rather such hypnotic process goes to the weight of the testimony of the evidence and is a matter for determination by the trier of fact.

Even in the absence of impermissible suggestion, were the identifications of appellant herein still reliable? State v. Higgins and Manson v. Braithwaite, *supra,* mandate that the key to admissible identification is the reliability of that identification.

As discussed above, the record herein reflects no impermissible suggestiveness in the identification of appellant. The task of this court under existing authority is to review the reliability of identification from the "totality of the circumstances", see Neil v. Biggers, *supra.* The factors to be considered in the "totality of the circumstances" include the "opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontations", Neil v. Biggers,

supra, at 199. See also State v. Higgins, *supra*, at 160 and State v. Kent, 602 S.W.2d 799 (Mo.App. 1980).

In the instant case, the evidence was uncontroverted that appellant forced his way into the victim's station-wagon. Appellant made no attempt to conceal his face. Appellant walked to the location of the sexual assaults with both victims, again making no effort to conceal his face. Prior to the actual sexual assaults, both victims, while inside the house, observed appellant's face and the rest of his appearance. Even during the actual assaults, one victim could see through her blindfold. Hence, there was more than ample opportunity to view the appellant "at the time of the crime". Both victims were attentive to what was going on. Both victims provided police officers a description within a short time following the assault upon them. That description varied little and without marked difference from subsequent identification by both victims. The consistency of the victims' identification tends to establish the degree of attention and accuracy of the victims' prior descriptions. As to the level of certainty, one victim continuously and without reservation identified appellant by verbal description, the photographic array, the lineup and a positive in-court identification. The other victim expressed only one reservation as to complete and total positive identification, and that was the hearing of appellant's voice. The identity of the voice which led to an unequivocal positive identification by the second victim occurred when appellant made repeated outbursts during the course of trial in the courtroom. Regarding the final element, time, the record shows a general description of the night of the assault. This was followed by the observance of a photographic array three weeks later. That procedure was followed by the lineup observation some thirty-seven days later. It cannot be said that an unwarranted amount of time lapsed between the

time of the crime and the time of confrontation for purposes of competent identification.

Considering the totality of the circumstances, the standard set forth has been met, thereby rendering the identification of appellant reliable for purposes of its admissibility.

As set forth above, the court, at the outset, posed four questions which the court felt necessitated an answer in disposition of appellant's final point. Question one, based upon the foregoing, is answered in the negative as this court finds the use of hypnosis under the particular facts and circumstances of this case was not inherently unreliable and such matter does not go to its inadmissibility as a matter of law, rather, it is a matter to be weighed by the trier of fact. The evidence upon this record does not support appellant's contention that the hypnosis session revealed any impermissible suggestion. Regarding questions two and three, they are answered in the negative as the record fails to support the contention that the photographic array and the police lineup contained any element of impermissible suggestion. Question four is also answered in the negative because when the "totality of the circumstances" is considered from this record, the identification of appellant upon the reasons set forth above renders such identification reliable for purposes of its admission in evidence.

Point three is ruled against appellant.

For the foregoing reasons, that portion of the judgment relating to the convictions for armed criminal action is reversed. For the foregoing reasons, that portion of the judgment relating to the convictions for kidnapping, rape and sodomy is in all respects affirmed.

Donald L. Manford, Judge

All concur.

Supreme Court No. 62698

IN THE SUPREME COURT OF MISSOURI
January Session 1981

Western District No. 31117
TRANSFER

State of Missouri,
Respondent,

vs.

Eddie Lee Greer,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Now at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1981, and on the 13th day of January 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 13th day of January, 1981.

/s/ Thomas F. Simon, Clerk
/s/ Anne Berhorst, D. C.

APPENDIX A-4

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD31334

STATE OF MISSOURI,
Plaintiff-Respondent,

vs.

HAROLD HAWKINS,
Defendant-Appellant.

OPINION FILED November 3, 1980

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE JAMES A. MOORE, JUDGE

Before Clark, P.J., Dixon, J., and Somerville, J.

Defendant appeals concurrent convictions for armed robbery and armed criminal action. The conviction for armed criminal action must be reversed. Sours v. State, ... S.W.2d ..... (Mo. banc 1980) [No. 61458 filed August 18]. The issue remaining is the propriety of the evidence of identifications made by the victim in the armed robbery case.

The facts are relatively simple. The victim was accosted outside his residence and, with a gun at his back, was relieved of his money. Upon demand, he indicated there was more money in the study of his home. Forced into the lighted study with the gun in his back, the victim feigned a fainting spell and observed the assailant for "a real good look" for "about two minutes." The assailant

was interrupted in his rummaging through the drawer of a desk by the arrival of the victim's landlord who lived upstairs. The assailant shot the victim and at the landlord, then fled. The victim gave the police a detailed description of the assailant.

Some thirty minutes later, a police officer came to the scene to show a lab technician a "mug shot" of a person police suspected of a rash of robberies in the area. The purpose was to have the technician check any fingerprints found at the scene with the fingerprints of the person in the "mug shot." These fingerprints would be in the file with the number of the "mug shot." The victim inadvertently glimpsed the photo and made a tentative identification. On the basis of the physical description given by the victim, a policeman had attempted to apprehend the defendant some eleven blocks from the scene. The victim later identified the defendant in a lineup.

The defendant contends that the out-of-court identifications were improperly placed in evidence. The State counters first with a persuasive argument that the out-of-court identifications were admissible. It is not necessary to reach or decide that issue, however, as the State did not offer any evidence that the victim had made any out-of-court identifications. That evidence was elicited by defendant's attorney on cross examination. A defendant may not assert prejudice arising from testimony produced by defendant's own counsel. State v. Cooksey, 499 S.W.2d 485, 488 (Mo. 1973); State v. Stenner, 591 S.W.2d 123, 125 (Mo. App. 1979).

The defendant also contends the in-court identification of the victim was improperly admitted. Even if it be assumed that the earlier out-of-court identifications were suggestive—a fact which the State strenuously and persuasively contests—the in-court identification is admissible if it is

inherently reliable and had an origin and basis independent of the other identifications. State v. Bivens, 558 S.W.2d 296 (Mo. App. 1977); State v. Jones, 558 S.W.2d 810 (Mo. App. 1977).

Viewing the entire evidence, there was an inherent reliability in the identification and an independent basis for it. The victim viewed the defendant in a lighted room; he had "a real good look" for "two minutes." His description from that view was a very precise description of the defendant, causing the police to attempt to apprehend the defendant near the scene of the crime. His view of the defendant was not casual or passing; it was intentional. The in-court identification was unequivocal, and the relatively short periods between the crime and the out-of-court identifications do not imply the later positive in-court identification was not inherently reliable. Under the standards by which the admissibility of in-court identifications are measured and in the totality of the circumstances, the in-court identification was properly in evidence. State v. Higgins, 592 S.W.2d 151, 160 (Mo. banc 1979), *appeal dismissed* Higgins v. Missouri, ... U.S. ..... (1980);[1] State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978).

The conviction for armed robbery is affirmed; the conviction for armed criminal action is reversed.

All concur.

David J. Dixon, Judge

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1. 100 S.Ct. 1825, 64 L.Ed.2d 254.

Supreme Court No. 62700

IN THE SUPREME COURT OF MISSOURI
January Session 1981

Western District No. 31334

State of Missouri,
Respondent,

vs.

Harold Hawkins,
Appellant.

Now at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I. THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1981, and on the 13th day of January 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 13th day of January 1981.

/s/ Thomas F. Simon, Clerk
/s/ Anne Berhorst, D. C.

APPENDIX A-5

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 31116

STATE OF MISSOURI,
Respondent,

vs.

JACKIE MARTIN,
Appellant.

OPINION FILED October 1, 1980

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE DONALD L. MASON, JUDGE

Before Turnage, P.J., Shangler and Manford, JJ.

This is a direct appeal from a jury conviction for robbery, first degree, and the second offense of armed criminal action. The jury assessed punishment of nine years for the robbery conviction and seven years for the armed criminal action. Pursuant to §546.430, RSMo 1978, the trial court reduced the sentences to seven years and five years respectively, said terms to run consecutively. The judgment is reversed in part and affirmed in part.

Two points are presented on this appeal. Appellant first alleges the trial court erred in its failure to dismiss Count II of the information, which alleged armed criminal action, because that count placed appellant in double jeopardy. As his second point of error, appellant charges

the trial court committed plain error by admitting into evidence a black .38 caliber revolver, because the revolver was irrelevant to the offense charged and its admission was prejudicial.

On January 6, 1978, at approximately 3:30 p.m., appellant was observed by two employees of the Avis-Rent-A-Car offices in downtown Kansas City, Missouri. Appellant was observed looking up and down the street. He then entered the office and asked to rent a car. When appellant was asked for his driver's license, he produced a gun, demanded money and a car. Upon this demand, an employee handed appellant $266.00 and the keys to a rental automobile. At this point, a third employee entered the office, requesting assistance from his fellow employees to load a lawnmower into a motor vehicle. This third employee passed through the office, apparently unaware of the robbery in progress. This third employee then reentered the office and during his reentry, appellant passed this employee while making his escape.

The three employees then observed appellant enter a black Oldsomobile. Appellant departed that vehicle and then entered a black Monte Carlo. As appellant drove the Monte Carlo away, he was also observed by the three employees.

The police were alerted. The following day, appellant was observed driving the stolen vehicle and after a high-speed vehicular chase and a brief foot-chase, appellant was apprehended by the police.

Following his trial, conviction and the overruling of his timely filed motion for new trial, appellant lodged this appeal. At this juncture, appellant's first point is taken up and sustained. This court is bound to follow the last controlling decision of our State Supreme Court on

any issue; see State v. Wood, 531 S.W.2d 543 (Mo.App. 1975) and Mo. Const. Art. V, §2.

In his point one, appellant alleges that conviction for armed criminal action, pursuant to §559.225(1), RSMo Supp. 1976, and in addition to conviction for armed robbery, first degree, places an accused in double jeopardy. It would serve no purpose to reiterate herein the debate which has ensued over this issue, and it suffices to state that upon a split decision, our State Supreme Court has decided the question on the basis that conviction for armed robbery and armed criminal action constitutes double jeopardy when the facts necessary to prove conviction for one offense also constitute the necessary facts to prove the second offense. An exhaustive analysis of the subject is to be found in and the reader is referred to Sours v. State, 593 S.W.2d 208 (Mo.banc 1980) (decision vacated by order of the United States Supreme Court on May 27, 1980 and reconsideration ordered) and the most recent decision, Sours v. State (No. 61458, handed down by the Missouri Supreme Court [en banc] on August 18, 1980), reinstating the original decision. Pursuant to the August 18, 1980 decision of Sours v. State, *supra,* point one raised by appellant is sustained.

Appellant's remaining alleged error charges the trial court with the commission of plain error in the admission of a black .38 caliber revolver because said revolver was irrelevant to the proof of the charge against appellant, and any probative value such evidence might have had was outweighed by its inherent prejudicial effect upon appellant's right to a fair trial.

Appellant invokes review for plain error. Such review could also be made upon the court's own motion pursuant to Rule 29.12(b) to determine any manifest injustice or miscarriage of justice.

In support of his second alleged error, appellant cites three cases for this court's consideration. These authorities are found to be distinguishable from and not controlling of the instant case. The first authority, State v. Williams, 543 S.W.2d 563 (Mo.App. 1976) involved a conviction for carrying a concealed weapon and the court reversed and remanded the lower court's decision, holding that the introduction of a second weapon found in an automobile in which the accused was a passenger was irrelevant to a conviction for carrying a concealed weapon, and that repeated reference to the second weapon was prejudicial error. State v. Charles, 572 S.W.2d 193 (Mo.App. 1978) involved a reversal for second degree murder and robbery where repeated questioning of the accused about the weapon he carried at a prior time (a weapon actually in possession of the police at the time of the present offense) and repeated prosecutorial comments about the particular weapon were improper. State v. Davis, 530 S.W.2d 709 (Mo.App. 1975) involved a reversal upon admission of a sawed-off shotgun which was not found in the possession of the accused or his criminal associates or under circumstances that justified inference of likelihood or possibility of its having been available to defendant for use in robbery or otherwise connected with defendant.

In the instant case, appellant argues that the admission of a .38 caliber Smith & Wesson blue steel revolver was a plain error because the rovolver was irrelevant to the proof of the offense charged. Appellant's argument is premised upon the testimony of the victims of the robbery.

Appellant contends that since two of the victims testified that they told the police the gun used in the robbery was silver in color, and that the gun recovered by the police was black, inherent prejudicial error was committed.

If this court were to cease with such limited consideration of the evidence in the record of this case, appellant's argument might tend to acquire some semblance of merit. Reference to the entire evidence dispels appellant's contention however.

Two of the employees of the business that was robbed positively identified appellant as the robber. An additional employee witness observed appellant's flight from the scene o fthe crime. Regrading identification of the gun, the first witness testified:

"Q. (By Mr. Schaffer, prosecuting attorney) I'm going to hand you what has been marked State's Exhibit No. 5 and ask you if you can identify that?

A. It looks rather like the one that he had.

Q. Okay. When I hold it and it is empty. When I hold it in this position, is there anything different about it?

A. No.

Q. To the best of your knowledge, it is the same gun that he had in his possession that same day that he robbed you with?

A. To the best of my knowledge.

Q. Did he have anything on his hands while he was robbing you?

A. He was wearing gloves.

Q. By the way, I asked you to identify State's Exhibit No. 5 and you said it looks rather like the weapon that the defendant was carrying. Would you just for the record, would you say what that object is?

A. State's Exhibit No. 5?

Q. Yes, what is it?

A. It's a gun."

That line of questioning was then followed by cross-examination of the witness as follows:

"Q. All right. Does this look like the gun?

A. Yes, it does.

Q. What color is this?

A. Well, it's black.

Q. Black?

A. Yes.

Q. Right?

A. Yes.

Q. That's the color you gave the police on the day of the robbery?

A. Well, I told them it was a silver color with the light shining on it. It does kind of look silver.

Q. I didn't ask you that. I asked you what did you tell the police on the day of the robbery?

A. That it was silver.

Q. Told them it was color, didn't you?

A. Not shiny.

Q. What color would you call silver? Is that silver enough for you?

A. Yes.

Q. You told them it was that color?

A. It's not shiny.

Q. Isn't silver usually shiny? That's black.

A. I have a silver car.

Q. Let me just ask you this, Mrs. S..... What color did you tell the police the gun was?

A. Silver.

Q. Are you saying today that the gun was black or silver?

A. The gun here is black and I told the police that it was silver.

Q. All right.

A. Silver and gray to me are the same color.

Q. Well, is this silver gun that you think that you saw on that day?

A. It looks very much like the gun that I saw that day.

Q. All right. But you do know this gun is not silver?

A. Yes.

Q. Now, all I'm getting at Mrs. S.... is on the day— Let's see, maybe it is. At any rate, you described the gun as a silver gun. Silver, gray and black all look the same or is it silver and gray?

A. Silver and gray.

Q. Is this the color of gray you're talking about?

A. With the lights the way they were, it did look gray. It's brighter there and the sun shines in the office a lot more than in here.

Q. So, you think that may have been the gun?

A. Yes, I do."

The foregoing testimony was then followed by another employee's testimony on the same issue:

"Q. Now, you mentioned that as he came in and stood in front of that counter he pulled a revolver. I'll

show you what has been marked as State's Exhibit No. 5 and ask you if you can identify this?

A. Yes, that's the weapon.

Q. You think it is?

A. I think it is.

Q. Does it appear to be the same weapon?

A. I think so.

Q. Okay. Is there anything different about it that you can see today? Anything different about it and a weapon that appeared on January 6, 1978?

A. No, I don't think so."

and this second employee then testified upon cross-examination as follows:

"Q. All right. Have a seat. Now, isn't it true, you looked at the gun the robber had on that day, didn't you?

A. Yes.

Q. And isn't it true that you told the police that it was a chrome plated pistol?

A. Yes, I did.

Q. Is this a chrome plated pistol?

A. No.

Q. And this doesn't look like the pistol, does it?

A. It looks like a pistol, yes.

Q. It's not chrome plated.

A. No, but it still looks like a pistol.

Q. Here is what I'm saying. You described a pistol, you told the police, is this chrome plated?

A. Yes.

Q. Chrome plated is the color of a bumper?

A. It is.

Q. And you told the police the pistol was the color of a a[sic] chrome plated?

A. Yes.

Q. Is that true?

A. That's true.

Q. You see this pistol? Is this pistol chrome plated?

A. No, it's not.

Q. It's not chrome plated?

A. No.

Q. Do you want to rub to see if it's chrome plated underneath there? It's not chrome plated at all, is it?

A. No.

Q. How do you say that the pistol was the color of the pistol but the pistol you got is black but it looks like the pistol that they had on the day of the robbery?

A. It's still a pistol.

Q. It's still a pistol?

A. Yes.

Q. Even though it's not chrome plated?

A. That's right.

Q. The pistol you saw on the day of the robbery was chrome plated, is that right?

A. I don't know.

Q. So, you don't know what color the pistol was, do you?

A. No, I know it was a pistol, that I saw.

* * *

Q. You have admitted that you were in error on your testimony on the pistol, haven't you?

A. That's possible."

The evidence continued with the testimony of the police officer who arrested appellant. The testimony relevant to the issue of the gun is as follows:

"Q. So, you were a police officer on January 7, 1978?

A. Yes, I was.

Q. Do you recall whether or not you were actually working on that day?

A. Yes, I was working.

* * *

Q. Did you have occasion, now, directing your attention to around the hour of eleven o'clock in the morning on that date, did you have occasion to go to the vicinity of 12th and Garfield?

A. Yes.

Q. Why was it you went there?

A. To meet my captain, Captain Steven Neefer.

Q. What happened when you got there?

A. He showed me a black '77 Monte Carlo, Missouri license Y54193. Stated it was a stolen car taken in a robbery and asked me to set up a surveillance.

Q. What was that?

A. Y54193.

Q. Did you take any action in response to his order?

A. Yes, I set up a surveillance down the street about a block from the car.

* * *

Q. Did anything happen with regard to that car before the day was over?

A. At approximately 12:50 hours a Negro male and Negro female got in the car and drove down the street toward us.

* * *

Q. What did they do once they had entered the car?

A. They drove it in the direction I was sitting.

Q. What happened next?

A. They drove right by us and we pulled in behind them and proceeded on down 13th Street to Prospect. They went south on Prospect to the freeway entrance. We followed them on the the freeway. At 27th Street he evidently noticed we were behind him because he speeded up and we put the red light on.

* * *

Q. Now, referring back to—did you tell the jury the persons in the car, this '77 Chevrolet Monte Carlo got off on 27th Street exit?

A. Yes, he did.

Q. What happened next?

A. He got off on the 27th Street exit and sped up to, attempting to elude us. We have a portable red light we keep in the car and I put it up on top of the car and we had our siren and he proceeded on westbound 27th Street at a high rate of speed.

* * *

Q. What happened, did you follow them?

A. Yes, we pursued him westbound on 27th Street to Askew at which time he made a right turn and went northbound on Askew approaching 26th Street. As he approached 26th Street he attempted to make a left—but he lost control of the car and slid into a house. He bailed out of the car and jumped over the fence. I bailed out of the police car and ran right after him. We went over two fences and he started to go through a yard of another house and there was another officer coming down the other street and he turned back at which time when he turned back he reached into his side to pull what I believed to be a revolver, at which time I drew my weapon and he pitched the weapon in the bushes and he was subdued and arrested at that time.

Q. Did you at any time loose [sic] sight of the '77 black Monte Carlo with the aforementioned license plates?

A. No, sir.

Q. Did you at any time after that car had crashed and that person bailed out and began to run, did you at any time loose [sic] sight of that person?

A. No, I did not.

Q. Did you actually see that person toss the gun somewhere?

A. Yes, I did.

Q. And where was it that he tossed it?

A. He tossed it in some bushes right beside where he was standing.

Q. Were you the officer who actually made the arrest?

A. I was one of the officers.

Q. Who was the person who had been driving the car and pitched the gun and ran?

A. The gentleman at the table there in the blue suit.

Q. Do you know his name?

A. I do now. Jackie Martin.

* * *

A. After we wrestled him to the ground I reached over and picked up the gun and put it in my waistband and transported him to the station.

Q. When you reached over and picked the gun up, was the gun in the same area you had seen him throw it?

A. Yes, it was.

Q. I'm handing you what has been marked State's Exhibit No. 5. Can you identify that, please?

A. It's a .38 Smith and Wesson blue steel revolver, appears to be the one I found at the scene there that day."

Then, on cross-examination, the officer testified:

"Q. State's Exhibit No. 5, Officer, you identified as blue steel .38 caliber [sic] Smith and Wesson, is that correct?

A. Yes, I did.

Q. That's the gun that you saw Jackie Martin throw into the bushes?

A. Yes, sir.

Q. Not a chrome plated one?

A. No, sir.

Q. Not a nickel plated one?

A. No, sir."

Appellant's argument is premised upon the testimony of the state's witnesses that identification of the gun in question was only "similar" to the one used in the robbery and, from that, appellant contends it was plain error for the gun to have been admitted into evidence.

To be sure, the general rule regarding any weapon or object not connected with a crime for which the accused stands charged is inadmissible unless such weapons or objects have some probative value, see State v. Duncan, 540 S.W.2d 130 (Mo.App. 1976); State v. Johnson, 539 S.W.2d 493 (Mo.App. 1976), cert denied 430 U.S. 934 (1977); but the determination of the proper admission turns upon whether or not there is evidence to connect the weapon or object with the crime or with the accused, see State v. Duncan, *supra;* State v. Threat, 530 S.W.2d 41 (Mo.App. 1975) and State v. Thompson, 559 S.W.2d 34 (Mo.App. 1977).

Identification of demonstrative evidence must be connected with a crime or the accused, but that identification need not be absolute, positive, certain or entirely unqualified when related to the question of admissibility, see State v. Chambers, 550 S.W.2d 846 (Mo.App. 1977); State v. Lawson, 585 S.W.2d 247 (Mo.App. 1979); State v. McAllister, 534 S.W.2d 611 (Mo.App. 1976); State v. Threat, *supra;* State v. Holman, 556 S.W.2d 499 (Mo.App. 1977) and State v. Kern, 447 S.W.2d 571 (Mo. 1969).

The equivocal identification of the gun in the instant case went to the weight of such evidence, and that determination was for the trier of fact. This question has been summarized as follows and finds direct application in the instant case:

> "The identification of an item at trial need not be entirely unqualified, as the weight to be given to identity is for the jury . . . [citations omitted] . . . Testimony

> concerning an exhibit that it 'looks like', 'looks familiar', 'very much like', 'very similar', etc., to an involved object, has been held sufficient to warrant its admission into evidence." State v. Ridinger, 589 S.W.2d 110, 113 (Mo.App. 1979).

The testimony in the instant case brings this case within the rule of State v. Ridinger, *supra.*

In addition, it should be pointed out that at the time of his arrest, appellant had been driving the stolen Monte Carlo and just prior to his being physically subdued, he threw a .38 caliber handgun into some bushes in the immediate area of his arrest. There is authority for the admission of such evidence under a general precept that "a weapon found in the possession of an accused, or of his criminal associates, even if not identified as the weapon actually used in the commission of the crime, is admissible if similar in form and character to the one used," quoted in State v. Benson, 574 S.W.2d 440, 442 (Mo.App. 1978), citing also State v. Cuckovich, 485 S.W.2d 16 (Mo.banc 1972). State v. Benson, *supra,* also stands for the rule that identification of a weapon need not be wholly unqualified to make it admissible.

In the instant case, the testimony of the witnesses relating to state's exhibit no. 5, the .38 caliber revolver, is a matter of the weight and sufficiency of such evidence and not its admissibility. Such weight and sufficiency falls within the purview of the triers of fact.

There was no plain error in the admission of state's exhibit no. 5. By its admission, no manifest injustice or miscarriage of justice occurred. Under the facts and circumstances of the instant case as well as pursuant to authorities cited herein, point two presented by appellant is ruled against him.

For the reasons set forth herein, that portion of the judgment related to the conviction for armed criminal action is herein reversed.

For the reasons set forth herein, that portion of the judgment related to the conviction for armed robbery, first degree, is in all respects affirmed.

Donald L. Manford, Judge

All concur.

Supreme Court No. 62632

IN THE SUPREME COURT OF MISSOURI
September Session 1980

Western District No. 31116
TRANSFER

State of Missouri,
Respondent,

vs.

Jackie Martin,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Now at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1980, and on the 15th day of December, 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of December 1980.

/s/ Thomas F. Simon, Clerk
/s/ Anne Berhorst, D. C.

APPENDIX B

Section 559.240, RSMo 1969, is as follows:

559.240. Kidnapping.—1. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

2. Any person charged with such offense may be tried in any county into or through which the person so seized, inveigled, decoyed or kidnapped shall have been taken, carried or brought.

Section 560.120, RSMo 1969, is as follows:

Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135. RSMo 1975 Supp. is as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person con-

victed of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo Supp. 1976, is as follows:

559.225. Armed criminal action—penalty—exceptions.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976, No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]